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Via FOIA Online and email to: hq.foia@epa.gov, r5foia@epa.gov
Freedom of Information Officer
Environmental Protection Agency
1200 Pennsylvania Avenue NW (2822T)
Washington, DC 20460

Regional Freedom of Information Officer
EPA Region 5
Ralph Metcalfe Federal Building
77 West Jackson Boulevard
Chicago, IL 60604

Re: Kewaunee County Drinking Water Contamination Petition to U.S. Environmental Protection Agency (October 22, 2014) – FOIA Records Request

Dear EPA FOIA Officers:

On behalf of the 501(c)(3) nonprofit organization Kewaunee CARES, I submit this Freedom of Information Act (FOIA), 5 U.S.C. § 552, request. As described more particularly below, this request seeks records relating to the Petition that Kewaunee CARES and other petitioners submitted to the U.S. Environmental Protection Agency (“EPA”) on or about October 22, 2014 (the “Petition”), and EPA’s response and follow-up thereto. The Petition was grounded in the Safe Drinking Water Act (“SDWA”), the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and the Resource Conservation and Recovery Act (“RCRA”).

Kewaunee CARES (the “Requester”), its members, and supporters have a strong interest in records related to the federal government’s response to the Petition as well as the EPA’s short-term, interim, and long-term solutions to address drinking water contamination in Kewaunee County, Wisconsin. The requested information is not currently available in the public domain, including on EPA’s Online FOIA Reading Room.

Records Requested

Pursuant to FOIA, the Requester requests copies of any and all documents, records and communications of any kind, including but not limited to e-mails, letters, and memoranda relating to the Petition and EPA’s response and follow-up thereto, from October 22, 2014 to the present.

The records requested here include, but are not limited to hard-copy, printed, electronic, typed, handwritten, machine readable electronic records and documents, whether in original, copy, or backup format (hard or electronic) if the originals have been destroyed. “Records” also includes photographs, electronic mail, database records, applications, instant messages, text messages, telephone messages, voicemails, other sound recordings, webinars, video chats, faxes, notes of conferences or meetings or conversations or discussions, presentation records (such as Powerpoint), correspondence, letters, memoranda, correspondence, notes, reports, studies, projects, programs,

papers, books, articles, handbooks, manuals, guidance records, policy or procedure records, strategic planning records (including but not limited to records relating to strategies, priorities, objectives, goals, targets, standards), analyses, implementation and operation records, monitoring records, indicator records, progress records, inspection records, site visit records, cleanup and restoration records, forms (completed or blank), summaries, data, sampling, maps, figures, diagrams, drawings, schematics, surveys, graphs, charts, and any other compilation of data from which information can be obtained. "Records" also includes records, whether in proposed, draft, pending, interim, or final form.

The request also includes communications and correspondence, which is intended to include records sent, forwarded, received, or generated by or between any EPA representative, division, department, section, bureau, committee, or office management or field staff; inter or intra agency communications or correspondence; communications or correspondence with any agency or entity of the State of Wisconsin; communications or correspondence and third party, including but not limited to the Groundwater Collaboration Workgroup, any representative of any concentrated animal feeding operation based in Kewaunee County, Wisconsin, and any representative of regional or national dairy or beef industry interests.

It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

To save agency resources and the incurring any mailing expenses, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, the Requester asks that you disclose responsive records as they become available to you. Should you wish to discuss prioritizing the culling or releasing responsive records, please contact me.

Claims of Exemption from Disclosure

Kewaunee CARES requests that these materials be produced in an unredacted form, meaning that it seeks full disclosure of all information in the requested records. If you regard any requested records or portions of records as exempt from disclosure under FOIA, the Requester asks that you exercise your discretion to disclose the records nonetheless.

We emphasize that this request applies to all described documents the disclosure of which is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records or you or your office has destroyed records that could reasonably be construed to be responsive to this request, we request that you describe the withholding in detail and separately state your reasons for not releasing the records in their entirety by: (1) identifying each such document with particularity (including title, subject, date, author, recipient, and parties copied); (2) explaining in full the basis on which nondisclosure is sought; (3) providing any segregable portions of the records for which you do not claim a specific exemption, and (4) providing facts and reasons for the withholding determination. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal

the denial. Such statements will be helpful in deciding whether to appeal an adverse determination and in formulating arguments in the event an appeal is taken. 5 U.S.C. § 552(b).

Any delay in responding to this FOIA request or extensions sought must comply with the limited exceptions provided by the FOIA.

Fee Waiver Request

Kewaunee CARES requests that EPA waive any fees for this request because disclosure is clearly in the public interest. The FOIA requires the federal government to furnish documents to public interest groups free of charge, or at a reduced rate, “if disclosure of the information is in the public interest.” 5 U.S.C. § 552(a)(4)(A)(iii). As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as Kewaunee CARES, access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”).

As explained below, the Requester satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l). If EPA would like additional information, or if EPA determines that Kewaunee CARES should be denied in whole or in part it request for a fee waiver such that fees exceed \$25.00 (40 C.F.R. § 2.107(e)), please contact me to discuss the processing of this request.

Requirement 1:

Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

- a. The subject matter of the requested documents concerns operations or activities of the federal government.*

Kewaunee CARES seeks EPA records related to EPA’s response and follow-up to the October 22, 2014 Petition that Kewaunee CARES and other organizations submitted to EPA under the SDWA, CERCLA, and RCRA. EPA regulates both drinking water and concentrated animal feeding operations, which are key subjects of the Petition. EPA delegates some authority the State of Wisconsin, but ultimately EPA maintains an important oversight role that includes authority to conduct investigations and take enforcement actions on drinking water and concentrated animal feeding operation issues. As this request relates to these EPA operations and activities, the information requested clearly “concerns the operations and activities of the federal government,” and therefore satisfies the first fee waiver criterion. 40 C.F.R. § 2.107(l)(2)(i).

- b. The disclosure is “likely to contribute” to understanding of federal government operations or activities.*

Disclosure is likely to contribute to an understanding of EPA’s operations or activities, 40

C.F.R. § 2.107(l)(2)(ii), because it will shed light on EPA's consideration of, and response to, the Petition and EPA's evaluation of the Petition in light of the SDWA, CERCLA, and RCRA, and agency regulations. The request is expected to release records relating to EPA's recent activities to ensure that public drinking water is protected from concentrated animal feeding operation pollution, to independently investigate concentrated animal feeding operation pollution, and to take independent enforcement action when necessary.

The records requested will be "meaningfully informative," *id.*, of EPA's activities because the information is not "already . . . in the public domain, in either a duplicative or a substantially identical form." *Id.* Complete specific and comprehensive information about EPA's response and follow-up activities in Wisconsin relating to the Petition is not currently publicly available; the Requester has reviewed information publicly available at EPA's online FOIA website prior to submitting this request, and determined that not all of the information requested is available through EPA's website. Such requested information will allow the Requester and the public to better understand the extent of EPA's actions to carry out its duties under federal laws relating to the Petition, including EPA's independent enforcement authority and its responsibility to ensure that delegated agencies in Wisconsin are adequately implementing water protection programs. The requested information is critical to gaining an understanding of these EPA operations and activities.

c. The disclosure will contribute to "public understanding" of EPA's operations and activities.

The disclosure will contribute to "public understanding" of the subject of the request because it will contribute to the understanding of a "reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.").

The Requester will disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons. Kewaunee CARES will do so in ways that effectively contribute to the public's understanding of the Petition, EPA's response and follow-up. Kewaunee CARES is a small volunteer-run nonprofit organization made up of local residents and business owners and community members from Kewaunee County, Wisconsin. For over a decade, Kewaunee CARES has developed local knowledge and expertise to regularly review and analyze information and data relating to the county's drinking water, concentrated animal feeding operations, and federal and state policy issues related to decision-making. Kewaunee CARES has previously submitted state and federal public records requests, and used this information to write, speak, and advocate to the media and the public on environmental issues. Kewaunee CARES representatives frequently attend local and state meetings related to topics addressed in the Petition, and has on at least 2 occasions met and conferred with EPA. Each year, Kewaunee CARES attends and participates in approximately 30-40 public meetings on safe drinking water and concentrated animal feeding operations. Kewaunee CARES frequently uses public records and other public data to interact and educate the public regarding concentrated animal feeding operations, water pollution, Kewaunee County, and other issues of public interest to the region. For example, Kewaunee CARES maintains and regularly updates their Facebook Page and uses this tool to communicate with the public regarding meetings, public notice and comment opportunities, and discussions working to find a solution to Kewaunee County's drinking water problems. Kewaunee

CARES is therefore prepared to analyze the information and present it to the public in a way that will most effectively increase public understanding of the subject.

Kewaunee CARES will make the information received from EPA available to national, regional, state, and local organizations with members and supporters interested in the subject, such as co-Petitioners Midwest Environmental Advocates, and also to national groups like the Socially Responsible Agricultural Project. Cumulatively these organizations have thousands of members nationwide and in Wisconsin. Due to Kewaunee CARES' large collective membership interested in this subject, Kewaunee CARES' demonstrated ability to effectively analyze EPA records and disseminate information to the public directly and through the media, and its' relationships with other organizations that can reach a broad audience of persons interested in the information in the requested records, the Requester is uniquely able to contribute to "public understanding" and meet this fee waiver criterion.

d. The disclosure is likely to contribute "significantly" to public understanding of EPA activities.

The Requester also meets the fourth fee waiver criterion, because the public's understanding of EPA's operations or activities related to drinking water and concentrated animal feeding operations in Wisconsin "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because the Requester and interested members of the public know little about EPA's response and recent follow-up activities relating to the Petition, or how or whether EPA has been using its investigation, information collection, or enforcement authorities to protect water quality and public health from concentrated animal feeding operations pollution in Wisconsin, the requested disclosures will undoubtedly increase public understanding of these subjects by a significant extent.

The records requested are not currently available on EPA's website in their entirety, elsewhere on the Internet, or have been previously published by EPA. As mentioned above, the Requester has reviewed EPA's FOIA online website prior to submitting this FOIA request. Moreover, since the June 2016 publication of the Groundwater Collaboration Workgroup's Final Report regarding groundwater contamination in Wisconsin (*see link available at* <https://www.epa.gov/wi/kewaunee-county-groundwater>), a workgroup which involved EPA's participation and contained recommendations for action, are of great interest to Kewaunee CARES. In particular, Kewaunee CARES seeks records confirming actions the EPA is taking in responding to and following-up to the Petition. Without this information, interested members of the public are currently largely in the dark regarding EPA's activities and the implementation of EPA's recommendations to address these issues. The requested records have significant informative value, and transparency with regard to EPA's oversight of concentrated animal feeding operations, drinking water which is increasingly important in the wake increased concerns about drinking water regionally and nationally. Disclosure of the requested records will provide the public with a comprehensive view of EPA's activities in Wisconsin relating to Petition, enabling Requester and the public to evaluate the consistency and effectiveness of EPA's activities and operations.

As discussed above, the Requester has demonstrated its ability to significantly increase public understanding of water pollution issues in Kewaunee County, including through the use of federal and state public records, in the past, and given the current lack of public access to the information sought in this request, will certainly do so again in this case. The Requester is experienced at analyzing, synthesizing, and distilling public agency records and making them available and easily

understandable to interested members of the public. In so doing, the Requester is able to ensure that the increase in public understanding of EPA's response and follow-up to the Petition will be significant.

**Requirement 2:
Disclosure is not primarily in the commercial interest of the Requester**

a. The Requester has no commercial interest in obtaining the information

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two factors must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester[s]." 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, the Requester does not have any commercial, trade, or profit interest in the material requested. The Requester will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

b. Disclosure is not "primarily in the commercial interest of the requester"

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow the public to learn about and evaluate the adequacy of EPA's drinking water and concentrated animal feeding operation-related activities in Wisconsin. Thus, even if the Requester did have some "commercial" interest in the documents requested, a complete fee waiver would still be required because the Requester's "*primary*" interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" the Requester and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's activities and operations regarding drinking water and concentrated animal feeding operations in Wisconsin, and will not serve any commercial interest on the part of the Requester. Under these circumstances, the Requester fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact us before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting us, the Requester will not be responsible for those costs.

Conclusion

Pursuant to the FOIA, access to the requested records should be granted within twenty (20) working days from the date of your receipt of this request.

The Requester reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact us at the telephone numbers and/or email addresses provided below. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely, on behalf of Kewaunee CARES,

s/ Elisabeth A. Holmes

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